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A NEW VIEW OF THE DARTMOUTH COLLEGE CASE.

II.

[The notes by Chief-Justice Doe, of which the following pages constitute the second part, were made some time since in the investigation of a case then pending before the Supreme Court of New Hampshire. He may use them in preparing the opinion to be hereafter reported in that case. — EDITORS.]

WOULD the result be different[1] if the charter, instead of being granted by the Crown before the Revolution, had been granted by the Legislature since the adoption of the State Constitution in 1784? This question may arise in determining the effect to be given to the clause reserving the power of alteration, amendment, and repeal, now generally inserted in corporate charters. In construing a reserved power of amending and repealing a charter, it is necessary to inquire whether the reservation has any effect, whether the charter would be amendable and repealable without it, and whether it was a useless effort of a perpetual body of public servants to retain a power of which they were incapable of divesting themselves. By the true construction of the State Constitution

[1] [At the end of the first part of this article (6 Harvard Law Review 161, at pages 176–81) the writer reached the conclusion that the actual charter of Dartmouth College which dated from 1769, was not irrepealable, and could not legally have been made so by the king, its grantor. — EDITORS.]

have the people of New Hampshire conferred upon their legislative agents a contractual authority to deprive those agents and their principals of the whole, or any part, of the sovereign right of legislation? This is not always or generally a federal question. And whatever federal exceptions may be asserted, and whatever judgments federal mandates may require us to render contrary to our opinion, it is the duty of the court to adhere to the local construction believed to be sound. By a general abandonment or suppression of it, we should attempt to throw upon federal judges a responsibility which they cannot rightfully assume, and which they refuse to accept. The correctness of that construction being maintained here in all cases, and being carried into practical effect in the rendition of all judgments not controllable by federal process, there will be no avoidance of responsibility in either jurisdiction.

"The supreme legislative power within this State shall be vested in the Senate and House of Representatives."[1] Does this delegation of power to agents authorize them to bind themselves, their successors, and their principals by a promise that all or any part of the delegated power of making law by repeal or otherwise shall not be exercised? The power, delegated to these agents to be used by them according to their discretion and judgment, with no express or implied right of substitution, is not negotiable, and cannot be used by their assignees.[2] By what rule of construction does the agents' authority to make law enable them to suspend their own duty, and bind their principals, by agreeing with a third party that law shall not be made? What legal principle allows an agent to disable himself and his principal by divesting them both of the power which the agent is appointed to exercise? No one contends that the Senate and House can change the Constitution; no one denies that their valid contract, divesting them of the entire law-making power which the Constitution vests in them, would be an amendment of the Constitution; and they can no more amend it by destroying a part of that power than by destroying the whole of it. A construction established by long usage and common consent, even if it is admitted to be erroneous, may be maintained on the authority of precedent. Its judicial reversal might be unjust, and within the spirit, if not within the legal meaning, of the prohibition of retrospective laws.[3] But when the true construction

[1] Const. of N. H., Art. 2.

[2] State *v.* Hayes, 61 N. H. 264, 323–339.

[3] Bellows *v.* Parsons, 13 N. H. 256, 261; The Genesee Chief, 12 How. 443, 458.

is sought no constitutional line can be found running through the law-making power, and separating destructible parts of it from the rest. There is not a word in the document expressly indicating the locality or the existence of such a line. By no legal reasoning can it be inferred that the mere grant of legislative power to agents authorizes them to bind their principals by a promise that certain parts of that power shall never be exercised, or shall not be exercised during a specified time. There is no legal measure of the extent to which the State can be thus disfranchised. There is no legal test for ascertaining the portion of sovereignty that can be suspended or destroyed.

On this question the doctrine of incidental power is irrelevant. "It is . . . a general maxim that an authority to accomplish a definite end carries with it an authority, so far as the constituent can confer it, to execute the usual legal and appropriate measures proper to accomplish the object proposed." [1] But this rule of construction does not enable the grantee to amend the grant. By fair construction, a corporation has the incidental authority necessary for the exercise of its express powers; but its alteration of its powers is an amendment of its charter, which it cannot amend in the slightest degree. By reasonable implication, an agent may do what must be done for the execution of his express commission, — wherein no alteration, however minute and however necessary, can be made by him. The legislative agents of the State have no express or implied authority to alter the Constitution. It would be altered by increasing or diminishing the legislative power vested in them by the second article, and they would diminish that power if they could make a charter irrepealable. On the second day of June, 1784, when the Constitution began to be in force, they had the whole legislative power, including the power of repeal; and from that day to this, by the true construction, they have been legally incapable of diminishing that power by contract or otherwise. If there is an irrepealable charter, they have altered their commission. The second article could have been qualified by this proviso: "But, for a consideration by them deemed sufficient, the Senate and House may, by contract, restrict the legislative power of repeal within such limits as they think necessary or expedient." Under such a clause, the extent to which they could reduce the repealing power

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[1] Valentine *v.* Piper, 22 Pick. 85, 92; Com. *v.* Temple, 14 Gray, 69, 77, 80; Goodale *v.* Wheeler, 11 N. H. 424, 429; Boody *v.* Watson, 64 N. H. 162, 177.

would not be a judicial question. The second article could have also been qualified by the proviso that "for a consideration by them deemed sufficient, the Senate and House may, by contract, restrict the legislative power of repeal within such limits as the Supreme Court of the State think necessary or expedient." Until this clause or its equivalent is inserted, the members of this court will not be authorized to determine, according to their notions of necessity or expediency, the bounds within which the Legislature may, by contract, restrain the repealing power. Without an equally explicit amendment, a discretionary authority to establish such bounds will not be vested in a federal tribunal.[1]

But if (contrary to the foregoing views) the capacity to surrender the repealing power is held to exist in the Legislature, what language shall be deemed to afford sufficient evidence of a legislative intention to make such surrender?

The power of legislation operates on all persons and all property. It is granted by all for the benefit of all. It is a part of government, and need not be reserved. When exemption from it is not granted by express contract, a corporation is no more exempted than an unincorporated company or an individual would be, carrying on the same business.[2] Whenever any power of the State is said to be surrendered or diminished, whether it be the taxing power or any other, the same principle applies, and the rule of construction must be the same.[3] "This rule is elementary. . . . In Charles River

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[1] Upon this subject of the surrendering capacity of the Legislature, see the following conflicting authorities; Opinion of R. B. Taney, dated Sept. 5, 1833, in 45 Niles's Register, 151, Nov. 2, 1833; Fletcher *v.* Peck, 6 Cranch, 87, pp. 134, 135, and 143; Gooyler *v.* Georgetown, 6 Wheat. 593, 595, 598; East Hartford *v.* Hartford Bridge Co., 10 Howard, 511, 534, 535; Debolt *v.* O. Co., 1 Ohio State, 563, 578, 579, 581, 582; M. Bank *v.* Debolt, 1 Ohio State, 591; Knoop *v.* Piqua Bank, 1 Ohio State, 603; Toledo Bank *v.* Bond, 1 Ohio State, 622; s. c. Bank *v.* Wilbor, 7 Ohio State, 481, 504, 509; State Bank of Ohio *v.* Knoop, 16 Howard, 369, 404, 407, 415, 416, 427, 428, 429, 431, 432; Ohio L. I. & T. Co. *v.* Debolt, 16 Howard, 416, 441, 442, 443, 444, 451; Beer Co. *v.* Massachusetts, 97 U. S. 25, 33; Stone *v.* Mississippi, 101 U. S. 814, 817, 819, 820; New Orleans *v.* Houston, 119 U. S. 265, 275; Butchers' Co. *v.* Crescent Co., 111 U. S. 746, 750, 751; Tiedemann, Police Power, 190; Horne *v.* Rouse, 8 Wallace, 430, 443, 444; New Jersey *v.* Yard, 95 U. S. 104, 114, 115; Mott *v.* P. R. Co., 30 Penn. State, 9, 27, 29, 35, 36, 38; E. Saginaw M. Co. *v.* E. Saginaw, 19 Mich. 259, 273, 274, 275, 276, 277, 282; Thorpe *v.* R. Co., 27 Vt. 140, 146; R. Co. *v.* Reid, 64 N. C. 155, 160.

[2] Province Bank *v.* Billings, 4 Pet. 514, 561, 562, 563.

[3] Charles River Bridge *v.* Warren Bridge, 11 Pet. 420, 547, 548, 549, 550; Richmond R. Co. *v.* Louisa R. Co., 13 How. 71, 81; Binghampton Bridge, 3 Wall. 51, 74, 75, 82; Turnpike Co. *v.* State, 3 Wall. 210.

Bridge *v.* Warren Bridge[1] the court said this rule of construction was not confined to the taxing power."[2] There is no surrender of the right of taxation, or any other power of sovereignty, unless the surrender is expressed in terms too plain to be mistaken.

If the point were not already adjudged it would admit of grave consideration whether the Legislature can give up the power of taxation any more than they can give up the police power or the power of eminent domain. But the point being adjudged, the surrender, when claimed, must be shown by clear, unambiguous language.[3] It can only be done by a clear expression of the legislative will.[4] The language in which the surrender is made must be clear and unmistakable.[5] If, on any fair construction, there is a reasonable doubt whether the contract is made out, the doubt must be solved in favor of the State. The language used must be of such a character as, fairly interpreted, leaves no room for controversy.[6] Every reasonable doubt should be resolved against it. It is in derogation of public right, and narrows a trust created for the good of all.[7] A reasonable doubt is fatal to the claim. *Prima facie*, every presumption is against it. It is only when the terms of the concession are too explicit to admit fairly of any other construction that the proposition can be supported.[8] The affirmative must be shown. Silence is negation, and doubt is fatal to the claim. This doctrine is vital to the public welfare, and axiomatic in the federal court.[9]

The New Hampshire rule of charter construction is, in substance and effect, the same as the federal. The legal construc-

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[1] 11 Pet. 419, 548.

[2] Stone *v.* F. L. and T. Co., 116 U. S. 307, 326; O. Co. *v.* Debolt, 16 How. 416, 435; Jefferson Branch Bank *v.* Skelly, 1 Black, 436, 446; Gilman *v.* Sheboygan, 2 Black, 510, 513; P. R. Co. *v.* Maryland, 10 How. 376, 393.

[3] Delaware Railroad Tax, 18 Wall. 206, 225, 226.

[4] P. R. Co. *v.* Maguire, 20 Wall. 36, 42.

[5] Erie R. Co. *v.* Pennsylvania, 21 Wall. 492, 499; Memphis G. L. Co. *v.* Shelby County, 109 U. S. 398, 401.

[6] Bailey *v.* Magwire, 22 Wall. 215, 226.

[7] Tucker *v.* Ferguson, 22 Wall. 527, 575.

[8] West W. R. Co. *v.* Supervisors, 93 U. S. 595, 598; Farrington *v.* Tennessee, 95 U. S. 679, 686.

[9] F. Co. *v.* Hyde Park, 97 U. S. 659, 666; Hoge *v.* R. Co., 99 U. S. 348, 355; Memphis R. Co *v.* Com'rs, 112 U. S. 609, 617; Newton *v.* Com'rs, 100 U. S. 548, 549, 561, 562; S. R. Co. *v.* Wright, 116 U. S. 231, 236; V. R. Co. *v.* Dennis, 116 U. S. 665, 667, 668; Tennessee *v.* Whitworth, 117 U. S. 139, 145; Given *v.* Wright, 117 U. S. 648, 655; C. R. Co. *v.* Guffey, 120 U. S. 569, 575; Cooley, Taxation, 70, 205; Cooley, Const. Lim., 394, 395; The Elsebe, 5 C. Robinson, 155.

tion of a charter or other statute is the ascertainment of the Legislature's intention. In one sense, their intent is a matter of law: it is a question for the court. In another sense, it is a matter of fact: it is to be determined by the natural weight of competent evidence.[1] The weight of the evidence is not fixed by an arbitrary rule of strict or liberal construction. But the consequences of a contract wholly or partly releasing one person or all persons from governmental control render it highly improbable that such a surrender is ever intended. A total release of all, rescinding the express agreement written in the first article of the Constitution, dissolving the body politic formed by that agreement, and substituting anarchy for government, differs in degree only and not in kind, from a partial release of one. Whether an alleged abdication and dissolution is total or partial, perpetual or temporary, the inherent improbability of a revolutionary intent is competent evidence, and its natural weight is not overcome by anything less than very clear proof. Legislators are agents[2] employed, not in the rescission, but in the performance, of the social contract; and between a total and a partial rescission, no line of legal principle can be drawn as a boundary of their agency.

But the integrity of their principals is not to be unnecessarily impugned by other agents employed in the judicial department. The social contract requires an exact and constant adherence to justice and honesty as virtues indispensably necessary to preserve the blessings of liberty and good government.[3] And the construction, settled in this State by universal understanding and usage, applies the doctrine of equitable estoppel to such partial and temporary relinquishments of legislative power as have heretofore been made and acquiesced in. When a promised exemption from taxation, for a term not exceeding ten years,[4] has induced the promisee to make an investment which the promisors desired him to make, he cannot be defrauded by a repudiation of the promise. If any of the promisors deny the authority of their agents to make the exempting bargain with him, their objection should be seasonably presented for enforcement by an adjudication of the rights of both parties that will prevent his relying upon a promise judi-

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[1] State *v.* Hayes, 61 N. H. 264, 330.

[2] N. H. Bill of Rights, Art. 8.

[3] N. H. Bill of Rights, Art. 38; Const. of N. H., Art. 83.

[4] 58 N. H. 624; State *v.* Express Co., 60 N. H. 219, 259; Boody *v.* Watson, 63 N. H. 320.

cially decided, or universally believed to be valid. When their silence and apparently unanimous assent have led him to change his position, and won for them the stipulated benefit of the investment made by him on the faith of the exempting agreement, they cannot contest their agents' authority to make the agreement. The public and every individual, and all corporations, public and private, are held to one standard of probity. Neither the State nor a municipality can gain an unfair advantage from the promisee's ignorance of law by postponing, till his investment is completed, an objection which is unseasonable after they receive the benefit of their agents' unauthorized contract, and which an honest man, in their situation, would raise before that time or never. Whether this construction is theoretically sound, we need not inquire. It has been settled too long to be disturbed, and is too firmly planted in moral principle to excite a desire for its reversal. It detracts nothing from the necessity of strong evidence to show an intention of the Legislature to exercise a releasing power which they do not possess, and which cannot be sustained against a seasonable objection.

The enacting clause of English statutes is said to have come into general use as late as the reign of Charles II. When parliamentary legislation recognized the ancient supremacy of the king by taking the form of a petition of the two houses granted by him,[1] his enactment of such a statute as a corporate charter without the concurrence of either house was naturally written, like his conveyance of property, in the terms of a grant. But a valid act of incorporation, by whomever made and in whatever terms expressed, is a law, and a law must be either temporary or perpetual. It was argued in the College case that the charter was made irrepealable by clauses that made it a perpetual law.[2]

"Some statutes are temporary, others are perpetual. A temporary statute continues in force, unless it be sooner repealed, until the time for which it is made expires; a perpetual one until it is repealed. . . . Every statute for the continuance of which no time is limited, is perpetual, although it be not expressly declared so."[3] Ridley *v.* Bell[4] was an action of debt on a temporary statute, made to be in force from March 25, 1694, to May 17, 1697, and made perpetual by an Act of 1695. In the volume of "Acts and Laws of

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[1] 1 Bl. Com. 181.

[2] 4 Wheat. 651, 679, 681, 682, 689.

[3] Bac. Abr. Statute (D).

[4] Lutw. 215, 221.

His Majesty's Province of New Hampshire," printed in 1771, under the head of "Temporary Laws," are twenty-six statutes, made to be in force for terms varying from two to twenty years. They are preceded by an Act of Parliament, limited in duration at the time of its passage in 1713, and "Made perpetual by 4 George I. *c.* 12." In 1769, when the College charter was issued by the Provincial Governor in the name of the king, the distinction, and the legal purpose and effect of the distinction, between perpetual laws continuing in force until repealed, and temporary ones continuing in force during their expressed terms, unless sooner repealed, were perfectly understood in this Province and in England. On neither side of the ocean did any one imagine that the division of statutes into these two classes made either class or both irrepealable or contractual. It was as well understood then as it is now that one law is called temporary because it will expire at the end of its term, if not sooner repealed, and that another is called perpetual because it contains no limit of duration, and will be perpetual if not repealed. Valid Acts of Incorporation are laws; and the construction that makes them irrepealable because they are either temporary or perpetual makes all laws irrepealable for the same reason.

The usual form of limitation in the temporary laws of the Province was, "This Act to continue and be in force for the term of —— years, and no longer." In a perpetual law it is not necessary to say, "This Act shall continue and be in force forever." Such a provision would be nothing more than correct construction. An Act of Incorporation, like any other statute, is not temporary unless made so by express limitation; and whether it is temporary or perpetual, it is to be construed like other statutes, unless there is some distinct and sufficient reason for an exception to the general rule. The section, "This Act shall continue and be in force for the term of fifty years, and no longer," would have the same meaning in a charter as in any other law; and the section, "This Act shall be in force forever," would be as superfluous in one as in the other.

The limiting clause means "This Act, if not sooner repealed, shall continue and be in force for the term of —— years, and no longer. The perpetuity clause means "This Act shall be in force until it is repealed," or "This Act is not temporary." Either clause, of itself alone, held to have a meaning in Acts of Incorporation, which it does not have in other laws, would be an anomalous and groundless exception. Construing either clause, without more, to be a contractual and irrevocable surrender of repealing power,

would be a violation of the rule that requires clear proof of intended abdication. Language used in every other case for the sole purpose of enacting that a repealable law is or is not temporary, is not clear proof of a purpose to make an incorporating law irrepealable. Legal terms, of established signification, naturally and ordinarily expressing an intention to fix the duration of a repealable law, are no evidence of an express or implied contract for the surrender of repealing power.

A law may contain the terms of an express contract. When the Legislature say, "Towns may by vote exempt" manufacturing establishments from taxation "for a term not exceeding ten years, . . . and such vote shall be a contract binding for the term specified therein,"[1] the intention to authorize towns to relinquish tax power is plainly expressed, and the necessity of plain expression is recognized. Equally explicit is their enactment "that upon any of the aforesaid banks accepting and complying with the terms and conditions of this Act, the faith of the State is hereby pledged not to impose any further tax or burden upon them during the continuance of their charters."[2] When they say, "This charter shall not be revoked, annulled, altered, limited, or restrained without the consent of the corporation, except by due process of law,"[3] there is no doubt of their purpose to surrender the power of repeal. They may express their surrendering purpose in less explicit terms, but when they intend to release any one from their repealing power, it cannot be presumed that they will leave their intention to be inferred from terms that have always been used merely to set forth the temporary or perpetual character of all forms of repealable law, including corporate charters and grants of corporate rights.

On the subject of a relinquishment of governmental power, the charter of Dartmouth College is silent. There are no words which import a relinquishing contract, and none can be implied. "If we maintain" that there is such a contract, "we must create it by a legal fiction, in opposition to the truth of the fact and the obvious intention of the party. We cannot deal thus with the rights reserved to the States, and by legal intendments and mere technical reasoning take away from them any portion of" their "power over their own internal police."[4] If there was no implied

[1] Gen. Laws of N. H., c. 53, § 10.

[2] Gordon *v.* Appeal Tax Court, 3 How. 133, 146.

[3] State *v.* Noyes, 47 Me. 189, 203; R. Comr's *v.* P. R. Co., 63 Me. 269, 281; Home *v.* Rouse, 8 Wall. 430, 431, 432.

[4] Charles River Bridge *v.* Warren Bridge, 11 Pet. 420, 548, 549, 552.

promise of the State to abstain from destroying the value of the Charles River toll bridge, and the value of its charter, by building a parallel and contiguous free bridge, there was no implied promise to abstain from a repeal of the charter.[1] That argument has not been answered; and under the true rule of charter construction adopted by the Federal and State courts, such charters as those of Dartmouth College and the ordinary railroad charters are not surrenders of the legislative power of amendment and repeal. Notwithstanding the suggestion of Judge Story in the College case,[2] that a reservation of that power is always necessary to prevent an implied surrender of it, subsequent decisions of the federal court adopt the true rule that the reservation is not necessary for that purpose. A surrender, actually intended and plainly expressed, would not be accompanied by a reservation of the surrendered power. If the surrender is not plainly expressed, it cannot be implied, and the reservation is superfluous. This is the logical result of the federal cases, and on the questions of State law arising in this case, we are at liberty to take correct views and to reject the doctrines of surrendering authority and implied surrender, that are generally, if not universally, admitted to be unsound, though not overruled in all their applications by the federal court.

The Senate and House could not surrender or suspend the legislative power of altering and repealing a corporate charter. Their reservation of the right of alteration and repeal in the modern charters and in the Revised Statutes[3] was a formal resolution to abstain from a contract they could not make, to keep a right they could not give up, and to leave to their successors what they could not withhold from them. Wholly inoperative under the true construction of the Constitution and charter, the reservation has all the effect it was designed to have. It protects the State against federal decisions which erroneously take it for granted that the delegation of law-making power to an endless series of legislatures authorizes them at any time to destroy the power continuously and perpetually vested in them and their successors, and that their destruction of it may be presumed without evidence. But even if they could destroy it, and if the reservation of it in the modern charters had been omitted, the true construction of those charters would have shown no destroying or suspending contract. Without the reservation, there would have been no more evidence of such a contract, or of any State contract, than there is with it.

Charles Doe.

[1] Story, J., in 11 Pet. 616, 617. [2] 4 Wheat. 708, 712. [3] Ch. 146, § 26.